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CONGRESSIONAL

STATEMENTS

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Congress of the United States

House of Representatives

Washington, D.C. 20515

September 12, 1984

Dear Colleague:

The House will shortly be considering H.R. 5164, the "Central Intelligence Agency Information Act," to improve CIA responsiveness to public requests for information under the Freedom of Information Act and to provide additional protection for certain sensitive CIA operational files. The legislation has been crafted with great care to ensure that modifying the application of the Freedom of Information Act to these files will neither diminish the amount of meaningful information currently available to the public under the FOIA nor diminish the important role of the courts in reviewing CIA compliance with the FOIA.

H.R. 5164 removes certain specifically defined sensitive CIA operational files from FOIA search, review and disclosure requirements. The contents of these files, which concern the sources and methods employed in the conduct of intelligence activities, are exempt from disclosure under existing FOIA exemptions for classified information and information relating to intelligence sources and methods, and have never been released under the FOIA.

Unproductive FOIA processing of CIA operational records which contain no meaningful information releasable under the FOIA absorbs a substantial amount of the time of experienced CIA operational personnel and of scarce tax dollars. This expenditure of time and money contributes nothing to the FOIA goal of an informed citizenry. In fact, it actively hinders achievement of that goal, because the time-consuming process of reviewing sensitive CIA operational records which prove unreleasable creates a bottleneck in the Agency's FOIA review process, causing a two-to-three year delay in CIA responses to many FOIA requests.

H.R. 5164 will eliminate the waste of resources on processing of unreleasable CIA operational records and will enable the CIA to respond more quickly and more efficiently to FOIA requests in the future than it has in the past. The legislation will also provide important additional assurances of security in the conduct of intelligence activities.

The bill specifically provides that CIA operational files will continue to be fully subject to FOIA search and review requirements for three important categories of FOIA requests: (1) requests by individuals for information on themselves, (2) requests concerning CIA covert actions, and (3) requests concerning the subject matter of investigations of intelligence activities for illegality or impropriety. The legislation also preserves the existing FOIA substantive standard of judicial review, which requires the courts to conduct de novo review of CIA action to implement the bill.

Finally, the legislation makes clear that the Privacy Act is not a nondisclosure statute displacing the disclosure provisions of the FOIA. This provision restores the proper relationship between the FOIA and the Privacy Act intended by Congress when it considered both statutes in 1974, but which has become confused by subsequent misinterpretation by certain administrative agencies and a few federal courts.

We urge you to join us in voting in favor of passage of H.R. 5164.

Sincerely,

EDWARD P. BOLAND
Chairman, Permanent Select
Committee on Intelligence

JACK BROOKS
Chairman, Committee on
Government Operations

J. KENNETH ROBINSON
Ranking Minority Member

FRANK HORTON
Ranking Minority Member

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STATEMENT OF THE HONORABLE JOHN N. ERLENBORN ON JULY 31, 1984
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS MARKUP OF H.R. 5L64

MR. CHAIRMAN, I WOULD JUST LIKE TO ADD MY SUPPORT FOR THIS BILL AND PARTICULARLY THE AMENDMENT TO CLARIFY THE RELATIONSHIP BETWEEN THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT. AS ONE OF THE AUTHORS OF THE PRIVACY ACT AND THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, I HAVE BEEN TROUBLED TO SEE A COUPLE OF CIRCUIT COURTS OF APPEALS RENDERING DECISIONS WHICH ARE CONTRARY TO THE GOALS OF THOSE TWO ACTS. EVEN MORE TROUBLING WAS THE RECENT DECISION OF THE JUSTICE DEPARTMENT AND OFFICE OF MANAGEMENT AND BUDGET TO REVERSE THE POLICY GUIDANCE AND REGULATIONS WHICH HAVE BEEN IN EFFECT SINCE THE PRIVACY ACT TOOK EFFECT IN 1975. THIS REVERSAL OF POLICY HAS THE EFFECT OF RESTRICTING AN INDIVIDUAL'S ACCESS TO GOVERNMENT FILES CONTAINING RECORDS ABOUT HIM OR HERSELF IN A WAY NOT CONTEMPLATED BY THE CONGRESS IN 1974.

SO, I CONGRATULATE AND THANK THE SUBCOMMITTEE FOR TAKING THE ACTION THEY DID AND I URGE MY COLLEAGUES TO REPORT THIS BILL AS AMENDED AND TO VOTE FOR IT WHEN IT COMES TO THE FLOOR LATER IN THE SESSION.

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STATEMENT OF THE HONORABLE FRANK HORTON ON JULY 31, 1984
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS MARKUP OF H.R. 5164

MR. CHAIRMAN, I, TOO, WOULD LIKE TO EXPRESS MY SUPPORT FOR H.R. 5164. THIS LEGISLATION HAS RECEIVED THE CLOSEST POSSIBLE SCRUTINY FROM THE SENATE, THE HOUSE INTELLIGENCE COMMITTEE, THIS COMMITTEE AND THE PARTIES MOST IMMEDIATELY AFFECTED BY ITS PROVISIONS, THE CIA AND ORGANIZATIONS SUCH AS THE ACLU WHICH REPRESENT PERSONS WHO MAKE REQUESTS FOR INFORMATION IN CIA FILES. THE OVERSIGHT PROVISION ADDED BY THE SUBCOMMITTEE WILL GIVE THE CONGRESS A TIMELY AND RELEVANT TOOL TO EVALUATE WHETHER THIS BILL IS ACHIEVING THE GOALS SET FOR IT. AS FOR THE OTHER AMENDMENT WHICH I HAVE ALSO COSPONSORED AS AN ORIGINAL BILL, WE ARE SIMPLY MAINTAINING THE STATUS QUO WHICH EXISTED BEFORE THE JUSTICE DEPARTMENT AND OMB UNWISELY REVERSED LONG-STANDING POLICY GUIDANCE. SO, I AM GLAD TO SUPPORT THE BILL AND URGE MY COLLEAGUES TO DO LIKEWISE.

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July 25, 1984

REMARKS OF HONORABLE THOMAS N. KINDNESS

Subcommittee on Government Information markup of H.R. 5164

Central Intelligence Agency Information Act

Mr. Chairman, I would like to express my support for the bill with the amendments you have just described and urge my colleagues to do likewise.

I would also like to add a few comments for the record on the third amendment you described, that is the content of a bill which I have cosponsored with you and Messrs. Brooks, Horton, and Erlenborn, H.R. 4696.

I think it is appropriate that we in the Congress act to clarify the relationship between the Freedom of Information Act and the Privacy Act and that this legislation is an appropriate vehicle in which to do that.

As one who has been involved in efforts to amend the Administrative Procedure Act over recent years, efforts which have been referred to as "regulatory reform", I am perhaps particularly troubled by agencies reversing longstanding regulations or policy guidance where there has been no change in the underlying statute by the Congress or no change in the circumstances. And, if some courts do not interpret the statutes as we in the Congress intended, I believe it is incumbent upon the Congress to clarify the law, removing any ambiguity which may exist.

This is an appropriate vehicle in which to make this clarification. The issue is clearly raised by this legislation. And, one need not, and should not, harbour feelings of mistrust toward the CIA in order to see the issue as it is raised in section 701(c)(1).

I understand that there is a Supreme Court case pending to resolve differences between several circuit courts of appeals on this issue of statutory interpretation. We in the Congress should save them the trouble and clarify the law on this point.

The Justice Department some time ago expressed its opposition to the action we take today. But we told them not to change the policy in the first place. That advice or guidance was offered without charge, and free advice at times is not considered very valuable. I think it is time, however, that the Department learned that the actions such as it took, reversing longstanding policy, jeopardize enactment of any Freedom of Information Act legislation, even this bill.

Mr. Chairman, I urge adoption of the amendment in the nature of a substitute, the bill as amended, and yield back the balance of my time.

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REMARKS OF HONORABLE GLENN ENGLISH

CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE AND AGRICULTURE

JULY 25, 1984

SUBCOMMITTEE MARKUP OF H.R. 5L64

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OPENING STATEMENT

MR. ENGLISH: The bill on our agenda today is H.R. 5164, the Central Intelligence Agency Information Act. This bill was jointly referred to the House Intelligence Committee and to the Government Operations Committee. The Intelligence Committee reported the bill on May 1 with an amendment in the nature of a substitute. This Subcommittee held a hearing on the bill on May 10.

If it is agreeable to the other members, I propose to proceed today by opening the floor to a general discussion of H.R. 5164. When the general discussion is concluded, we can consider amendments.

I intend to offer an amendment in the nature of a substitute incorporating all of the changes made by the Intelligence Committee as well as a few amendments of my own. I will ask unanimous consent to treat the substitute as original text, and we can consider any other amendments that may be offered.

If no one has any problem with this approach, I have a few introductory remarks.

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INTRODUCTORY REMARKS

H.R. 5164 provides administrative relief for the CIA from some of the requirements of the Freedom of Information Act. The right of individuals to request or receive information under the FOIA is not diminished because H.R. 5164 will not permit the CIA to withhold from the public any information that is now available under the FOIA.

The basic concept behind H.R. 5164 can be explained quite simply. The CIA maintains a large quantity of sensitive national security information that is and should be exempt from disclosure. If this information is requested today, the CIA can only deny access after a search for documents and a page-by-page review.

What H.R. 5164 does is to allow the CIA to avoid the unproductive search and review of documents that are almost certainly exempt from disclosure anyway. The reason that this is possible is because of the way in which the CIA's files are organized.

Three specific types of CIA files -- referred to in the bill as "operational files" -- contain the details of the intelligence process. This includes records relating to the identities of sources and methods, and to the routine administration and management of intelligence activities.

Since the information routinely maintained in these operational files is almost completely exempt from disclosure anyway, little will be lost if access to this information is denied without a detailed search and review.

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H.R. 5164 includes safeguards to make sure that the new authority given to the CIA will not be abused. Those who participated in the drafting process have attempted to make certain that the CIA cannot use its operational files to hide documents. On the whole, these efforts have been successful. However, just to be sure, I will propose an improvement in the bill's oversight mechanisms.

H.R. 5164 should help the CIA in several ways. There will be greater security for sensitive intelligence records and a diminished risk of disclosure. The CIA will also be able to make more efficient use of skilled personnel.

The public will also benefit from H.R. 5164. More efficient processing of requests should ultimately save some money for the taxpayer by making the processing of requests more efficient.

More importantly, the bill will allow for faster processing of FOIA requests. CIA Director Casey has committed the agency to establish a specific program to substantially reduce, if not entirely eliminate, the current backlog. I intend to see to it that the CIA lives up to this commitment.

I will postpone discussion of my amendments to allow other members to offer comments at this time.

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FURTHER COMMENTS

Before we proceed to the amendments, I would like to offer another comment. H.R. 5164 is the product of a long and intensive legislative process. Hearings were held in both the House and the Senate, and there has been public debate. The bill has been refined and improved at each step along the way. I especially want to commend House Intelligence Committee Chairman Boland and Subcommittee Chairman Mazzoli for their careful work on the bill and for the excellent legislative report. The CIA and the ACLU should also be commended for their willingness to cooperate and compromise on this bill.

I think that some lessons can be drawn here for the consideration of other exemption three statutes. The process by which H.R. 5164 has been considered should serve as a model. The bill was jointly referred to the committees with substantive interest in the subject matter of the exemption as well as to this Committee. There was adequate public notice, and all interested parties have been given an opportunity to comment.

This is a much better approach than the backdoor amendment process that unfortunately seems to be more traditional for FOIA matters. I think that our efforts on H.R. 5164 demonstrate that this Committee is willing to consider carefully written and narrowly drawn proposals that protect important interests.

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At the same time, I have to say that H.R. 5164 may well be a solution that will turn out to be unique to the CIA. The bill only works because of the way in which CIA files are organized. I doubt that the specific relief in H.R. 5164 could be applied to any other agency.

Nevertheless, there may be some useful precedents in the bill after all. I welcome other ideas that would increase the efficiency of the FOIA process without interfering with the public's access to information. I certainly would prefer hearing some new ideas in place of the same old stories about how the sky is falling because of the FOIA.

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AMENDMENTS

If there are no more comments, I ask unanimous consent that H.R. 5164 be considered as read and open to amendment at any point. Without objection...

I further ask unanimous consent that my amendment in the nature of a substitute be considered as read and that this amendment be treated as original text for purposes of amendment. Without objection...

I would like to explain what changes are included in the substitute I have offered. There are three sets of amendments included in the substitute, and members will find a detailed explanation in their folders.

First Change

First, the substitute incorporates 20 technical amendments that were made by the House Intelligence Committee. A copy of these amendments, together with a brief explanation, has been distributed.

Second Change

Second, my substitute includes a new oversight provision. I have been very concerned about oversight of H.R. 5164. The bill includes a very carefully written judicial review provision. It is a good provision, but more is needed.

In order to assure the Congress and the public that H.R. 5164 is working as designed, we need to assure effective oversight. I recently shared my concern on this point with Intelligence Committee Chairman Boland.

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I told him that I intended to conduct personal oversight of the CIA's implementation of H.R. 5164. I plan to visit the CIA and look over the shoulder of their FOIA staff.

However, I recognize that, because of the sensitive nature of CIA operations, the primary oversight burden must fall on the Intelligence Committees. I received a very positive response from Chairman Boland. He wrote:

> The Permanent Select Committee on Intelligence will undertake continuous and thorough review of the CIA's FOIA practices and procedures, specifically including its filing practices, to provide further assurances of full CIA compliance with the letter and the spirit of H.R. 5164.

I am very reassured by this commitment on the part of the House Intelligence Committee. Others with concerns about oversight should be equally reassured.

I ask unanimous consent that my correspondence with Chairman Boland be included in the record. Without objection...

We still need to allow for some public oversight, and this is what my amendment will do. It will increase the ability of the public to oversee CIA FOIA operations by making available semi-annually an unclassified report on operations under H.R. 5164. The reports must be made for the two years following enactment of the bill.

The purpose of the reports is to permit the Congress and the public to make sure that the CIA is complying with CIA Director Casey's commitment not to reduce the FOIA staff or budget for two years. The idea of a public report was raised at the hearing, and the CIA indicated its willingness to provide such a report.

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Third Change

The third amendment in my substitute is the addition of the text of H.R. 4696. I introduced H.R. 4696 in January, with Mr. Kindness, Mr. Brooks, Mr. Horton, and Mr. Erlenborn as cosponsors. This bill clarifies the relationship between the FOIA and the Privacy Act. This change is necessary in order to support one of H.R. 5164's important provisions.

H.R. 5164 provides that the CIA must continue to search and review operational files for individuals seeking access to their own files. This provision makes certain that an individual's right of access to records about himself will not be diminished in any way, not even procedurally.

A recent change in Justice Department and OMB Privacy Act regulations could make this provision of H.R. 5164 meaningless. The Justice/OMB regulations provide that any information exempt from disclosure to the subject of a record under the Privacy Act is also exempt from disclosure to that individual under the FOIA. This new interpretation is contrary to the understanding of thr relationship between these two laws that existed ever since the Privacy Act took effect in 1975.

Past Democratic and Republican administrations have agreed that the law requires that individuals be allowed access to the maximum amount of information about themselves that is available under either the FOIA or the Privacy Act.

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Unless we make certain that the Privacy Act cannot be used to deny individuals access to records about themselves that are currently available under the FOIA, a major provision of H.R. 5164 will be unenforceable.

My amendment restores the original understanding of the relationship between the FOIA and the Privacy Act. My amendment overturns the new Justice and OMB regulation. My amendment also makes certain that the Justice/OMB regulations cannot be used to deny individuals access to any government records to which access was previously available.

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H.K. 4696

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Congressional Record

CLARIFYING THE RELATIONSHIP BETWEEN THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Oklahoma (Mr. ENGLISH) is recognized for 60 minutes.

● Mr. ENGLISH. Mr. Speaker, today I have introduced a bill intended to clarify the relationship between the Freedom of Information Act and the Privacy Act of 1974. Recent judicial decisions and changes in regulations proposed by the Reagan administration have so confused the situation that it is now advisable to enact legislation in order to make sure that the original intent of the Congress will be followed.

The confusion over this issue is recent in origin. For many years, there has been no dispute about how the Freedom of Information and Privacy Acts mesh. An individual seeking access to his or her own record was always considered to be entitled to the maximum amount of information that is disclosable under either the Freedom of Information Act or the Privacy Act. This was the original understanding of those who drafted the Privacy Act of 1974, and the OMB Privacy Act guidelines have always reflected this position. Agencies, including the Department of Justice, have followed the same interpretation.

Consistent with its demonstrated lack of interest in the public availability of information in Government files, the Reagan administration is attempting to overturn this well-established interpretation of the law. The new "interpretation" is based on the proposition that the Privacy Act of 1974 was intended to prevent rather than foster an individual's right of access to records about himself. The Justice Department argues that the Privacy Act provides authority to withhold records that would otherwise be available to an individual under the Freedom of Information Act. This argument has been rejected by several circuit courts, although a few courts have accepted it. The Justice Department position however, is consistent only with a myopic view of the Privacy Act.

Congress enacted a code of fair information practices in the Privacy Act in order to provide safeguards against privacy abuses by Government agencies. One of the major elements of such a code of fair information practices—and one of the stated purposes of the Privacy Act—is to grant an individual the right to gain access to information pertaining to himself or herself in Federal agency files.

The Privacy Act also included other features of a code of fair information practices, such as a notice of information practices, limitations on disclosure of records to third parties, and collection and maintenance restrictions. Since not all of these features were appropriate for law enforcement, intelligence, and other sensitive Government records, the act permitted selected records systems to be exempted from some of these requirements.

The purpose of the exemptions was to adapt the code of fair information practices to the necessities of governmental recordkeeping. The exemptions were not intended to cut off rights that had already been granted in the Freedom of Information Act, and the Privacy Act did not in fact cut off those rights.

To illustrate the absurdity of the position taken by the Justice Department, consider the status of the central files of the Federal Bureau of Investigation. These files are completely exempt from first-party access under the provision of the Privacy Act exempting criminal investigatory records. However, the FBI has always accepted and processed similar requests under the Freedom of Information Act. Of course, information is exempt under FOIA if its disclosure would interfere with ongoing law enforcement proceedings, identify informats, disclose investigative techniques, or interfere with other important governmental or private interests. Notwithstanding the FOIA exemptions, most individuals have been able to see their FBI files in whole or in part.

If Privacy Act exemptions operate to exempt records from access under the FOIA as well, then why has the FBI responded to first-party requests under FOIA for all of these years? Why has the FBI sought amendments

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to the FOIA designed to restrict first-party access rights? Given the complaints made by the FBI over the years about the FOIA, it is hard to believe that compliance with so many FOIA requests has been entirely voluntary.

It is equally hard to believe that Congress passed the Privacy Act with the intent of completely cutting off first-party rights of access to FBI files. In fact, those associated with the passage of the Privacy Act have consistently said that no diminution of first-party Freedom of Information Act rights was intended.

Treating the Privacy Act as authority to withhold information under the FOIA leads to another absurdity. Under the Justice Department argument, a Privacy Act exemption operates to deny access to the subject of a record under both the Privacy Act and the FOIA. However, a request from a third party made under the FOIA cannot be denied using a Privacy Act exemption. Thus, it is possible that a third party will be able to obtain more information about an individual using the FOIA than the individual will be able to obtain about himself under the Privacy Act. This possibility has become known as the "third-party anomaly."

How often will this happen? Much information about an individual can be denied to a third party under the personal privacy exemption of the FOIA. However, an individual can waive his privacy rights and permit personal information to be disclosed to another person. If the Justice Department persists in its interpretation of the Privacy Act, this is likely to become a regular occurrence.

The bill that I am introducing today is very short. It adds the following new subparagraph to the Privacy Act of 1974:

(qX2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

This language will not actually result in any change in the Privacy Act. It will simply clarify that the longstanding interpretation of the interrelationship between the Privacy Act and the Freedom of Information Act is correct. But for a few erroneous court decisions and some poor policies that the Reagan administration is attempting to implement, this bill would be completely unnecessary.

I am pleased that Representatives BROOKS, KINDNESS, ERLENBORN, and HORTON have joined with me in sponsoring this legislation.●

● Mr. KINDNESS. Mr. Speaker, I join today with Mr. ENGLISH of Oklahoma in introducing a bill to add a little clarifying language to the Privacy Act of 1974. If enacted, the bill would make it clear beyond quibbling that the Privacy Act should not be construed by any agency or court to prevent an individual from obtaining information about that same individual from Government files if the information would otherwise be made available to the individual under the Freedom of Information Act.

Put another way, the issue is whether the Privacy Act of 1974 prevents an individual from seeking records about himself through the Freedom of Information Act when those records have been exempted from disclosure under the Privacy Act. This bill provides the answer. "No."

This issue was raised and resolved during the period of initial implementation of the Privacy Act of 1975. That resolution was embodied in policy guidance issued by OMB and in implementing regulations issued by the Department of Justice: An individual requesting records about himself is entitled to the maximum access available under either of the acts.

Thus, if an individual makes a request of, say, the FBI for records about himself, any such records in a system of records exempt from disclosure under the Privacy Act would still be subject to search, review, and disclosure under FOIA to the extent that the records are not exempt from disclosure under FOIA or the Bureau chooses not to assert any applicable exemptions—of which there several.

A change in litigating position at the Department of Justice, has fostered conflict in the courts and, thus, the Supreme Court has been asked to resolve a question of legislative intent. Meanwhile, last August the Department of Justice proposed a change in its rules for handling Freedom of Information Act and Privacy Act requests which reflects that change in litigating position. Current policy and rules, which reflect what I believe to be legislative intent, have been in effect since 1975.

The position recently taken by the Justice Department means that if an individual asks for records about himself and they reside in a system of records exempt under the Privacy Act, that individual gets nothing. This is the result even when another person, asking for the same records under the Freedom of Information Act, must be given the material.

This is almost exactly the situation the Congress faced 10 years ago when court decisions interpreting the original seventh exemption to the Freedom of Information Act virtually closed all access to law enforcement files.

That was remedied by Congress in its 1974 amendments to the Freedom of Information Act.

On the same day in 1974 that the House overrode the President's veto of the FOIA amendments, the House considered and passed its version of the Privacy Act. One month later the House took final action on the Privacy Act.

The Department of Justice would now have us believe that, by passing the Privacy Act, the Congress undid the changes it made in the Freedom of Information Act, and the Department has asked the Supreme Court to aid and abet that revision of history.

The Department has complained to the Congress about the impact of the FOIA on law enforcement agencies. I am sympathetic to the concern that convicted felons use the FOIA to seek information about themselves concerning informants. Carefully tailored changes to FOIA's seventh exemption are awaiting action by the other body in S. 774. Perhaps the Department is frustrated that, while those changes are relatively noncontroversial, they lie dormant on the congressional calendar. But the Department's proposed change in policy would create unreasonable and unwarranted results, beyond their stated purpose.

Implementation of the Department's change of policy would result in the anomaly that a third party would have greater access to an individual's files than the individual himself.

As one who has worked for a number of years on regulatory reform legislation, I am highly critical of agencies using rulemaking power to effect a 180 degree shift in policy when there has been no change in their underlying legislative authority. That is what has happened here. And, I have urged the Department not to put this policy change into effect.

Since the Department is trying to force the Supreme Court to rule that, for the last 10 years, everyone's understanding of what Congress did when it enacted the Privacy Act was wrong, I think we here in the Congress should eliminate any room for question or quibble, and save the Court the trouble.●

● Mr. ERLENBORN. Mr. Speaker, I am pleased today to join Representative GLENN ENGLISH and others in introducing a bill to clarify the relationship between the Freedom of Information Act and the Privacy Act of 1974.

Mr. Speaker, I was one of the authors of the Privacy Act of 1974 and the 1974 amendments to the Freedom of Information Act. I managed both of those bills here on the house floor and was intimately involved in the negotiations that led to the compromises which facilitated passage of those measures.

Freedom of information and privacy protection may appear to be antithetical concepts when what is at stake is the disclosure of information in Government files. But, to repeat what I said on the day the House considered the Privacy Act—which, by the way, was the same day we overrode the President's veto of the 1974 Freedom of Information Act amendments:

It has been quite an effort to walk a tightrope in the one bill to provide the maximum access to information on the part of the public, and in the other bill to limit access to protect an individual's privacy.

There has been a tendency, I think, to view these often as conflicting, but I think that we have successfully walked that tightrope and have, in both of these pieces of leg-

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islation, very important landmark legislation for open government, and yet the protection of individual rights.

In view of the court decisions and actions by the Justice Department which have led us to introduce this legislation today, I want to underscore the last words of that quote: With these two acts, we in the Congress were seeking to assure "open government and yet the protection of individual rights."

To put it as succinctly as I can, we in the Congress, by passing the Privacy Act, did not repeal any portion of the Freedom of Information Act which we were simultaneously amendment. We, in the Congress, by passing these two acts were enhancing the rights of our citizens to know what their Government was doing, particularly as those government actions related to individuals themselves. We certainly did not give with the one hand and take away with the other days later.

When the executive branch wrote its initial guidelines on how to implement the Privacy Act, some people seized on the different structure of the two acts to argue that an individual's sole means of access to records about himself was through the Privacy Act. Fortunately, the Office of Management and Budget had better judgment. It explained that in handling requests for information pursuant to the two acts, the net effect "should be to assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment." The Justice Department issued implementing regulations which would grant an individual access to records about himself "to which he would have been entitled under the Freedom of Information Act, but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto." (28 C.F.R. 16.57)

From a purely legal standpoint, this was not a satisfactory resolution. But, Congress intent was being implemented—individuals would get the cumulative benefit of both acts, which was what we intended.

Nevertheless, some courts have suggested that, by passing the Privacy Act, we were reducing the individual's rights of access to records about himself. The seventh circuit in Chicago issued such an opinion in 1979 in the case of *Terkel* v. *Kelly*, 599 F.2d 214 (CA7, 1979); and, when given the opportunity the next year, the fifth circuit in the case of *Painter* v. *FBI*, 615 F.2d 689 (CA5, 1980) reversed a district court decision and followed the seventh circuit.

In fairness to the Justice Department, it did ask the fifth circuit to vacate that part of its decision which interpreted the Privacy Act as limiting an individual's rights of access under the Freedom of Information Act. But the fifth circuit declined.

The District of Columbia Circuit, when confronted with this issue in the case of *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (1982), rejected the decisions in the seventh and fifth circuits and ruled that "material unavailable under the Privacy Act is not per se unavailable under FOIA." The court's opinion contains a thorough explanation of the issue and how it reached its conclusion—the proper one in my view.

Since that time, the third circuit in Philadelphia has followed the District of Columbia Circuit in the cases of *Porter* v. *Department of Justice*, (No. 83-1833, CA3, Sep. 15, 1983) and the seventh circuit has reaffirmed its original error. The Supreme Court has been asked to resolve this conflict in the circuits.

I think we ought to resolve the conflict ourselves by enacting this legislation to remind everyone of Congress intent with regard to the relationship between these two important acts.●

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PRIOR

CIA

CORRESPONDENCE

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CENTRAL INTELLIGENCE AGENCY

7 September 1984

Director, Office of Legislative Liaison

NOTE FOR: Director of Central Intelligence

To save time I have packaged the talking points for Senator Thurmond under my signature.

You had mentioned that you might want to pen a note to him on the package.

Charles A. Briggs

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OLL/LEG/KAD:ngm [redacted] 7 Sept. 84) STAT

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Central Intelligence Agency

Washington, D.C. 20505

7 SEP 1984

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As a follow-up to your conversation yesterday with Director Casey, I have been asked to send to you the attached information regarding the Privacy Act amendment which has been added to our FOIA bill by the House Government Operations Committee. Please do not hesitate to call if we can provide you with any further information.

Sincerely,

STAT

Charles A. Briggs
Director, Office of Legislative Liaison

Enclosure

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84-03046

Central Intelligence Agency

Washington, D.C. 20505

OLL 84-2934

6 September 1984

The Honorable William French Smith
The Attorney General
Washington, D. C. 20530

Dear Bill:

I write you on a matter on which our staffs are working and which is of high importance to our security interests. I bring it to your attention now because time is short and we may need to go over it together.

As you know, we have been trying for the last six years to obtain legislative relief from the unique burdens we face under the Freedom of Information Act (FOIA). We now are on the verge of obtaining this essential relief.

The pending legislation would bring major benefits to our national intelligence effort. It would remove from the search and review provisions of the FOIA large segments of our operational files, thereby allowing the CIA to provide greater assurances of confidentiality to our foreign sources and liaison services and releasing many of our most experienced officials from involvement in FOIA processing. It would also enhance the maintenance of compartmentation of CIA information, which is a principle crucial to the success of sensitive intelligence operations. The Administration, including the Department of Justice, has extensively examined and approved the proposal that CIA seek separate legislation for FOIA relief and the President has personally given his support.

Our legislation was unanimously passed by the Senate late last year. The House Permanent Select Committee on Intelligence amended the bill and unanimously reported it earlier this year. Representative Glenn English, Chairman of the House Government Operations Subcommittee on Government Information, Justice and Agriculture, then made the addition of an amendment to the Privacy Act a prerequisite for Subcommittee action on the legislation. This amendment simply states that the Privacy Act cannot be used as a withholding statute under exemption (b)(3) of the FOIA.

We understand that it is a matter of some concern to the Department of Justice because it would be contrary to the revised policy guidance given by the Department of Justice on the use of the Privacy Act as a (b)(3) exemption and because this very question is awaiting decision by the United States Supreme Court. On the other hand, we have been informed that the Department of Justice will withdraw its objections to Representative English's amendment to our bill if a satisfactory agreement can be reached on a substitute bill for S. 774, the government-wide FOIA relief bill. I understand that negotiations are currently under way to achieve this compromise.

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The Administration may have to evaluate the prospects and the relative value of getting CIA's sensitive operational files exempted against preserving Justice's ability to use the Privacy Act to exempt some files from demands under the Freedom of Information Act. The considerations from the CIA standpoint are:

a. Our operational files will no longer need to be searched.

b. Our foreign sources and liaison services would have greater assurance that we can preserve their confidentiality.

c. Some of our most able and experienced officers could turn from FOIA processing to gathering intelligence. The Agency can use only high caliber personnel to protect sources included in its operational files.

d. While the relief pertains only to the CIA records at this time, it certainly is a blueprint for other agencies in the Intelligence Community to obtain similar relief in the near future.

e. It is extremely important for the Agency and its personnel to continue the momentum on the legislative front which started with the passage of the Classified Information Procedures Act in 1982 by obtaining this legislation as opposed to allowing this hard fought effort to go down the drain without any appreciable results.

Bill, this is a critical issue for this Agency. We urgently need this relief from the FOIA. It would represent an auspicious start in achieving a goal to which this Administration has been committed since its inception. If we do not get enactment of this legislation in this Congress, the chances of its enactment over the next several years are slim. As a result of the successful adoption of Executive Orders 12333 and 12356 and passage of the Intelligence Identities Protection Act of 1982, this Administration has built up a positive regulatory and legislative momentum in the national security arena which would be severely impacted if we failed to obtain enactment of the FOIA legislation in this Congress. I believe with time running out in this session of the Congress it is essential we resolve this quickly.

Sincerely,

William J. Casey
Director of Central Intelligence

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Central Intelligence Agency

Washington, D.C. 20505

OLL 84-3342
30 August 1984

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Jim Frey:

I am writing to you on behalf of the Central Intelligence Agency (CIA) to request your assistance in determining on an expedited basis the position of the Administration on H.R. 5164, the Central Intelligence Agency Information Act, as amended and passed by the House Government Operations Committee. In the following paragraphs I shall attempt to summarize the legislative history of this legislation and explain the reason we are seeking your assistance at this stage in the legislative process.

As you know, the CIA has been seeking relief from the requirements of the Freedom of Information Act (FOIA) for several years. The FOIA poses unique problems for the CIA, particularly in our Directorate of Operations where a backlog of two to three years currently exists. H.R. 5164 was introduced by members of the House Permanent Select Committee on Intelligence (HPSCI) following hearings by that Committee on S. 1324 and H.R. 4431. It was unanimously approved by the Committee and represents the culmination of months of intense, lengthy negotiations which sought to accommodate the concerns of Members of Congress, the Agency, the ACLU, and numerous other press and public interest groups.[1] After having

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[1]Early on in the legislative process an attempt was made to have this legislation cover the entire Intelligence Community. Because of the unique nature of CIA's problems with the FOIA and because the file systems of the other agencies within the Intelligence Community are not organized in a manner that could accommodate the relief sought by this legislation, this effort was dropped. This issue was extensively examined by the National Security Council staff as well as OMB in meetings held with representatives of the Intelligence Community and the decision was made that the Administration would seek relief only for the CIA at this time.

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met this goal to the greatest extent possible in the language of H.R. 5164, the Chairman and Vice Chairman of the Senate Select Committee on Intelligence (SSCI), which unanimously passed the Senate version, S. 1324, in late 1983, informed the HPSCI that they would be willing to accept the legislation as embodied in H.R. 5164.

H.R. 5164 was then referred to the Subcommittee on Government Information, Justice, and Agriculture. The Agency was informed early on that plans were being made to amend the bill to add on a provision prohibiting the use of the Privacy Act as a (b)(3) withholding statute under the FOIA. This provision had been introduced by Subcommittee Chairman Glenn English in January 1984 as H.R. 4696, and had the bipartisan support of several members of the House Government Operations Committee. After hearings before the Subcommittee, the (b)(3) provision was added to H.R. 5164.[2] The Subcommittee also made some reporting requirement amendments which pose no problems for the Agency.

The (b)(3) amendment poses no problem for the Agency since we do not use the Privacy Act as a (b)(3) withholding statute under the FOIA. Following enactment of the Privacy Act and amendments to the FOIA in 1974, the policy of the Department of Justice (DOJ) had been that the Privacy Act was not to be invoked as a (b)(3) statute. About two years ago, in the context of a decision on other issues, a United States district court judge, sua sponte, ruled that the Privacy Act could be used as a (b)(3) statute under the FOIA. It is our understanding that after this judicial decision, and considerable internal debate within DOJ, a decision was made to change the policy regarding the Privacy Act so as to state that it could be used as a (b)(3) statute under the FOIA. This policy change angered several Congressmen and provided the impetus for the introduction of H.R. 4696. The new policy was reflected in the litigation posture of the DOJ in subsequent FOIA cases which resulted in conflicting decisions among the circuits. The DOJ has now sought and been granted certiorari on this issue.

When our views on H.R. 4696 were requested in March of this year, we deferred to the views of the DOJ. We know that DOJ is strongly opposed to the (b)(3) amendment because of their

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[2]The strength of the bipartisan views on this issue are reflected in the enclosed remarks made on this subject by various members of the House Government Operations Subcommittee on Government Information, Justice, and Agriculture.

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current policy and the pending Supreme Court review. However, another factor in this equation is that the introduction of the (b)(3) amendment provided the DOJ with the opportunity to break a deadlock on House action on S. 774, the government-wide FOIA legislation. Up to that point, Chairman English's Subcommittee had been unwilling to move this legislation forward. Now, however, vigorous negotiations among Mr. English's Subcommittee, the DOJ, the business community, press groups, and the ACLU are ongoing and reported to be going very well. Should an agreement be reached on a substitute for S. 774, we have been told that DOJ will withdraw its objection to the (b)(3) amendment on our bill. If, however, an agreement is not reached very shortly, we will be left with differing positions within the Executive Branch and the need for a decision as to the Administration position on our FOIA legislation.

The normal procedure would be for us to respond to a request for views on the legislation once it has been passed by the House. Our understanding is that S. 1324 will be brought up on the suspension calendar on 10 or 11 September, and passed with all after the enacting clause stricken and the language of H.R. 5164 inserted as an amendment. S. 1324 will then be sent back to the Senate without a request for a conference. At this point it is critical that an Administration decision be known since otherwise it is likely that action will be taken on the legislation by Senate backers of S. 774 which may not be in the overall best interests of the Administration.

The issue to be decided is whether the risk of losing the Central Intelligence Agency Information Act is worth the gain anticipated by continued opposition to the (b)(3) amendment. In our opinion, the Supreme Court decision on the use of the Privacy Act as a (b)(3) statute under the FOIA could go either way since there are compelling arguments on both sides. Should the Supreme Court rule against the DOJ, nothing will have been gained and FOIA relief for the CIA will have been put into the uncertain future of the 99th Congress. In addition, we feel that continued DOJ opposition to the (b)(3) provision will seriously jeopardize any efforts by the Administration to gain House passage of government-wide FOIA legislation in the next Congress. Finally, even if the Supreme Court rules in favor of the DOJ position on the Privacy Act, legislation will be introduced in the 99th Congress to overturn it.

We understand that there is discussion on the Senate side of striking the (b)(3) provision from S. 1324 when it is received from the House and then sending it back to the House for action. In our opinion, such action will reduce the chances of enactment of this legislation to almost zero in this Congress. Very little time remains and for this reason it is critical that an Administration position be taken on this legislation by 7 September. By doing so, the necessary time

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for consideration and balancing of interests will have been taken and the Administration will be armed with its strategy when action resumes on the legislation.

Therefore, we respectfully request that you take the necessary steps so that a decision can be reached and the appropriate Administration strategy can be formulated.

Sincerely,

STAT

Charles A. Briggs
Director, Office of Legislative Liaison

Enclosure

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